STATE OF MICHIGAN

SUPREME COURT

ASSOCIATED BUILDERS AND CONTRACTORS, SAGINAW VALLEY AREA CHAPTER, a Michigan Non-Profit Corporation,
Plaintiff/Appellant,

-vs-

KATHLEEN M. WILBUR, Director of the Michigan Department of Consumer & Industry Services and NORMAN W. DONKER, Midland County Prosecuting Attorney,
Defendants/Appellees,
and

MICHIGAN STATE BUILDING & CONSTRUCTION TRADES COUNCIL,
Intervenor/Defendant/Appellee,
and

MICHIGAN CHAPTER OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Michigan Corporation, MICHIGAN MECHANICAL CONTRACTORS ASSOCIATION, a Michigan Corporation, and MICHIGAN CHAPTER OF THE SHEET METAL AIR CONDITIONING CONTRACTORS NATIONAL ASSOCIATION, a Michigan Corporation,
Intervenors/Defendants/Appellees,
and

MICHAEL D. THOMAS, Saginaw County Prosecuting Attorney,
Intervenor/Appellee.

Midland T. Lubington

Lower Docket Case No.
00-2512-CL-L

Court of Appeals Docket No.
234037 op 8/5/03

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NOTICE OF HEARING

PLAINTIFF/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL FROM THE OPINION AND ORDER OF THE COURT OF APPEALS DISMISSING ABC'S CASE IN ITS ENTIRETY FOR LACK OF SUBJECT MATTER JURISDICTION

B39419

PLAINTIFF/APPELLANT'S BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

MASUD
PATTERSON &
SCHUTTER, P.C.
4449 Fashion Square Boulevard, Saginaw, MI 48603 • (989) 792-4499 • FAX (989) 792-7725

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APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT BY PLAINTIFF/APPELLANT ASSOCIATED BUILDERS AND CONTRACTORS, SAGINAW VALLEY AREA CHAPTER ("ABC"), FROM THE OPINION AND ORDER OF THE COURT OF APPEALS DISMISSING ABC'S CASE IN ITS ENTIRETY FOR LACK OF SUBJECT MATTER JURISDICTION

DAVID JOHN MASUD (P37219)
KRAIG M. SCHUTTER (P45339)
Masud, Patterson & Schutter, P.C.
Attorneys for Plaintiff
4449 Fashion Square Boulevard
Saginaw, Michigan 48603
(989) 792-4499

GARY L. LIEBER (*pro hac vice*)
ANESSA ABRAMS (*pro hac vice*)
Attorneys for Intervenors Michigan NECA,
Michigan MCA, and Michigan SMACNA
Schmeltzer, Aptaker & Shepard, P.C.
2600 Virginia Avenue, NW
Suite 1000
Washington, D.C., 20037
(202) 333-8800

MARY ELLEN GUREWITZ (P25724)
ANDREW A. NICKELHOFF (P37990)
Attorneys for Intervenors
Michigan NECA, Michigan MCA, and
Michigan SMACNA
Sachs, Waldman, O'Hare, Helveston,
Bogas & McIntosh, P.C.
1000 Farmer
Detroit, MI 48226
(313) 965-3464

JOHN R. CANZANO (P30417
Klimist, McKnight, Sale, McClow & Canzano
Co-Counsel for Intervenor MSBCTC
400 Galleria Officentre - Suite 117
Southfield, MI 48034
(248) 354-9650

RICHARD P. GARTNER (P27119)
ROBERT C. WARD, JR. (P21979)
Assistant Attorneys General
Attorneys for Defendant Wilbur
Labor Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-2560

LAWRENCE WM. SMITH (P27029)
Gilbert, Smith & Borrello, P.C.
Attorneys for Defendant Donker
721 S. Michigan Avenue
Saginaw, MI 48602
(989) 790-2500

ANDRE R. BORRELLO (P48651)
Gilbert, Smith & Borrello, P.C.
Attorneys for Intervenor MSBCTC
Michigan State Building & Construction
Trades Council
721 South Michigan Avenue
Saginaw, MI 48602
(989) 790-2500

DAVID M. GILBERT (P31230)
Gilbert, Smith & Borrello, P.C.
Attorneys for Intervenor Michael D. Thomas
721 South Michigan Avenue
Saginaw, MI 48602
(989) 790-2500

APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT BY PLAINTIFF/APPELLANT ASSOCIATED BUILDERS AND CONTRACTORS, SAGINAW VALLEY AREA CHAPTER

NOW COMES the Plaintiff/Appellant, Associated Builders and Contractors, Saginaw Valley Area Chapter ("ABC"), by and through its attorneys, Masud, Patterson & Schutter, P.C., and submits to this honorable Supreme Court this Application for Leave to Appeal, pursuant to M.C.R. 7.302. ABC filed as a declaratory action under M.C.R. 2.605 a detailed two-count Complaint in the Midland County Circuit Court alleging that the Michigan Prevailing Wage Act, M.C.L. 408.551; M.S.A. 17.256(1), *et seq.* ("PWA"), is both unconstitutionally vague and represents an unconstitutional delegation of legislative authority to private third parties. By written Opinion of the Court Midland Circuit Judge Thomas L. Ludington, dismissed ABC's unconstitutional vagueness claim but denied summary disposition on ABC's unlawful delegation claim. On appeal, the Michigan Court of Appeals dismissed ABC's lawsuit for lack of an actual case or controversy as contemplated under M.C.R. 2.605. The Court of Appeals also commented in *dicta* that it would have dismissed ABC's substantive claims in any event. ABC timely filed a motion for reconsideration with the Court of Appeals, which was denied. ABC contends that the Court of Appeals has committed legal error both in its conclusion that ABC has failed to present a case or controversy and in its conclusions by way of *dicta* that ABC has failed to raise meritorious claims. Accordingly, ABC seeks review of the pertinent Orders of the Court of Appeals by way of this Application for Leave to Appeal.

Dated this 20th day of October, 2003.

MASUD, PATTERSON & SCHUTTER, P.C.
Attorneys for Plaintiff/Appellant

By: _____
DAVID JOHN MASUD (P37219)
KRAIG M. SCHUTTER (P45339)
4449 Fashion Square Boulevard
Saginaw, Michigan 48603
(989) 792-4499

STATE OF MICHIGAN

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DAVID JOHN MASUD (P37219)
KRAIG M. SCHUTTER (P45339)
Masud, Patterson & Schutter, P.C.
Attorneys for Plaintiff
4449 Fashion Square Boulevard
Saginaw, Michigan 48603
(989) 792-4499

GARY L. LIEBER (*pro hac vice*)
ANESSA ABRAMS (*pro hac vice*)
Attorneys for Intervenors Michigan NECA, Michigan MCA, and Michigan SMACNA
Schmeltzer, Aptaker & Shepard, P.C.
2600 Virginia Avenue, NW
Suite 1000
Washington, D.C., 20037
(202) 333-8800

MARY ELLEN GUREWITZ (P25724)
ANDREW A. NICKELHOFF (P37990)
Attorneys for Intervenors
Michigan NECA, Michigan MCA, and Michigan SMACNA
Sachs, Waldman, O'Hare, Helveston, Bogas & McIntosh, P.C.
1000 Farmer
Detroit, MI 48226
(313) 965-3464

JOHN R. CANZANO (P30417
Klimist, McKnight, Sale, McClow & Canzano
Co-Counsel for Intervenor MSBCTC
400 Galleria Officentre - Suite 117
Southfield, MI 48034
(248) 354-9650

RICHARD P. GARTNER (P27119)
ROBERT C. WARD, JR. (P21979)
Assistant Attorneys General
Attorneys for Defendant Wilbur
Labor Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-2560

LAWRENCE WM. SMITH (P27029)
Gilbert, Smith & Borrello, P.C.
Attorneys for Defendant Donker
721 S. Michigan Avenue
Saginaw, MI 48602
(989) 790-2500

ANDRE R. BORRELLO (P48651)
Gilbert, Smith & Borrello, P.C.
Attorneys for Intervenor MSBCTC
Michigan State Building & Construction Trades Council
721 South Michigan Avenue
Saginaw, MI 48602
(989) 790-2500

DAVID M. GILBERT (P31230)
Gilbert, Smith & Borrello, P.C.
Attorneys for Intervenor Michael D. Thomas
721 South Michigan Avenue
Saginaw, MI 48602
(989) 790-2500

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STATEMENT OF BASIS FOR JURISDICTION

Plaintiff/Appellant, Associated Builders and Contractors, Saginaw Valley Area Chapter ("ABC"), has brought this Application for Leave to Appeal seeking reversal of an Order of the Michigan Court of Appeals dated August 5, 2003, and an Order of the Court of Appeals denying reconsideration dated September 29, 2003. In its August 5, 2003, Order, the Court of Appeals dismissed ABC's lawsuit in its entirety for lack of subject matter jurisdiction. The Court of Appeals committed an error of law when it concluded that ABC has failed to present a case or controversy as contemplated in M.C.R. 2.605. The Court of Appeals also rendered erroneous substantive rulings in *dicta* when, under established case precedent, the Court was duty-bound to dismiss the case without further comment.

ABC contends that the Opinion of the Court of Appeals is clearly erroneous under law and that its decision dismissing ABC's case in its entirety constitutes material injustice. Accordingly, this honorable Supreme Court has jurisdiction of ABC's timely filed Application for Leave to Appeal pursuant to M.C.R. 7.302(B)(5) and (C)(2).

STATEMENT OF QUESTIONS INVOLVED

1) DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR BY APPLYING A LEGAL STANDARD REQUIRING "ACTUAL OR THREATENED PROSECUTION" IN DETERMINING SUBJECT MATTER JURISDICTION WHEN DIRECTLY APPLICABLE, BINDING CASE LAW CLEARLY SHOWS THAT A CASE OR CONTROVERSY PROVIDING JURISDICTION DOES EXIST IN THIS CASE BY VIRTUE OF THE FACT THAT ABC MEMBERS MUST CONFORM THEIR BUSINESS PRACTICES TO THE MANDATES OF THE PREVAILING WAGE ACT OR FACE POTENTIAL CRIMINAL PROSECUTION?

   THE APPELLANT SAYS "YES."
   THE APPELLEES SAY "NO."
   THE MIDLAND COUNTY CIRCUIT COURT SAYS "YES."
   THE COURT OF APPEALS SAYS "NO."

2) DID THE COURT OF APPEALS COMMIT LEGAL ERROR WHEN IT FIRST DECIDED IT LACKED SUBJECT MATTER JURISDICTION OVER THIS CASE AND THEN SUBSEQUENTLY EXPRESSED IN *DICTA* THAT IT WOULD NOT FIND THE PREVAILING WAGE ACT TO BE UNCONSTITUTIONALLY VAGUE IN ANY EVENT?

   THE APPELLANT SAYS "YES."
   THE APPELLEES SAY "NO."
   THE MIDLAND COUNTY CIRCUIT COURT SAYS "NO" AS TO THE SUBSTANTIVE ISSUE.
   THE COURT OF APPEALS SAYS "NO."

3) DID THE COURT OF APPEALS COMMIT LEGAL ERROR WHEN IT FIRST DECIDED IT LACKED SUBJECT MATTER JURISDICTION OVER THIS CASE AND THEN MADE SELECTIVE SUBSTANTIVE DETERMINATIONS IN *DICTA* CONCERNING ABC'S CONSTITUTIONAL CHALLENGE TO THE PREVAILING WAGE ACT AS AN IMPERMISSIBLE DELEGATION OF LEGISLATIVE AUTHORITY?

   THE APPELLANT SAYS "YES."
   THE APPELLEES SAY "NO."
   THE MIDLAND COUNTY CIRCUIT COURT SAYS "YES" AS TO THE SUBSTANTIVE ISSUE.
   THE COURT OF APPEALS SAYS "NO."

INTRODUCTION

This Application for Leave to Appeal comes before this honorable Michigan Supreme Court seeking review of a September 29, 2003, Order of the Court of Appeals denying reconsideration of that Court's August 5, 2003, Order dismissing this present matter in its entirety. The underlying case arose out of a declaratory judgment action brought under M.C.R. 2.605 in the Midland County Circuit Court by Plaintiff/Appellant Associated Builders & Contractors, Saginaw Valley Area Chapter ("ABC"), challenging the constitutionality of Michigan's Prevailing Wage Act, M.C.L. 408.551; M.S.A. 17.256(1), *et seq.*, ("PWA").[1]

ABC contends that the PWA, which is enforced solely through criminal prosecution by county prosecutors, is unconstitutionally vague and epitomizes an unlawful delegation of legislative authority to unions and union contractors. Upon the filing of various motions for summary disposition by the Defendants and Intervenors, Midland Circuit Court Judge Thomas L. Ludington ruled that ABC had presented a valid case under M.C.R. 2.605 and that it had alleged facts and identified existing law sufficient to stave off summary disposition as to its unlawful delegation claim. The Judge did, however, grant summary disposition to the Defendants and Intervenors on ABC's vagueness claim. The Intervenors (but not the Defendants) appealed the

[1] ABC is a trade association representing merit shop construction contractors. ABC sued Ms. Kathleen Wilbur ("Wilbur") who at that time served as the Director of the Michigan Department of Consumer & Industry Services ("CIS"). The CIS is the government agency which administers the Act and investigates alleged violations of the law. ABC also sued Midland County Prosecutor Norman Donker ("Prosecutor" or "Donker"), the government official charged with criminal enforcement of the statute in Midland County where ABC maintains its office. Thereafter, several private entities were permitted to intervene and provide assistance in the defense of the statute – the Michigan State Building and Construction Trades Council ("MSBCTC"), which represents various trade unions in Michigan, and three unionized employer associations, the Michigan Chapter of the National Electrical Contractors Association ("NECA"), the Michigan Mechanical Contractors Association ("MCA"), and the Michigan Chapter of the Sheet Metal Air Conditioning Contractors National Association ("SMACNA"). The three Employer Associations maintain collective bargaining agreements with the unions represented by the MSBCTC. The MSBCTC and the Employer Associations are collectively referred to as "Intervenors" throughout this brief. The Court of Appeals also granted intervention to the Saginaw County Prosecutor, Michael D. Thomas.

denial of summary judgment on the unlawful delegation claim and ABC cross-appealed the dismissal of its vagueness claim. The Court of Appeals heard the appeals on June 17, 2003.

Despite the trial court having determined after briefing by the parties that an actual controversy exists in this matter and despite neither the Defendants nor the several interested Intervenors having raised the issue on appeal, the Court of Appeals dismissed ABC's case *sua sponte* based on a legally erroneous conclusion that it lacked jurisdiction for want of an actual case or controversy (Exb. A). Since the matter was not briefed before the Court of Appeals and since it is clear that *an actual case or controversy* ***does*** *exist* in this matter, ABC timely moved for reconsideration of the erroneous ruling. Even though ABC presented binding legal precedent to the Court of Appeals demonstrating its palpable error, the Court hastily denied the motion in a one sentence Order (Exb. B). Because the Court of Appeals has committed legal error resulting in the improper dismissal of ABC's meritorious case, the Orders of the Court of Appeals should be reversed by this Supreme Court.

Unfortunately, the Court of Appeals committed legal error beyond its dismissal of ABC's case for what it erroneously concluded is a lack of an actual controversy. Picking and choosing particular issues to address and making impermissible factual determinations, the Court also expressed in *dicta* throughout various portions of its Opinion that it would not find constitutional problems with the PWA in any event. The Court is clearly wrong however, as ABC can show that it has raised meritorious claims that the PWA is both unconstitutionally vague and represents an unlawful delegation of legislative authority to private third parties (unions and union contractors). Since ABC can show that the Court of Appeals committed legal error in its assessment in *dicta* of ABC's underlying legal claims, this honorable Supreme Court should

reverse the Orders of the Court of Appeals and remand the case back to the trial court for a proper decision on the merits of ABC's declaratory action.

STATEMENT OF FACTS

The PWA mandates construction employers to compensate their employees at predetermined "prevailing" wage and fringe benefit rates when working on projects financed in any part by the State of Michigan. M.C.L. 408.552. While alleged violations of the Act might first be investigated by the CIS, enforcement of the Act vests solely with county prosecutors through criminal prosecutions. M.C.L. 408.557.

The CIS is responsible for administering the Act and also for determining the prevailing rates under collective bargaining agreements in the applicable locality of each covered project. M.C.L. 408.553. The Act specifies that the wage and fringe benefit rates are taken exclusively from local collective bargaining agreements. M.C.L. 408.554. In "determining the rates," the CIS merely sends survey requests (Exb. C) to local construction unions throughout the state asking each union to list the classifications of workers they represent and the hourly wage and fringe benefits rates they require in their collective bargaining agreements (Exb. D) for the workers covered under those agreements. The CIS relies exclusively upon the reported information to establish the classifications and prevailing wage and fringe benefit requirements on state-funded projects. Accordingly, once the information from the unions is received, the CIS reduces the material to a wage report. (Exb. E).

To say that the Act requires the payment of "prevailing" wages in the locality is a misnomer. Union construction workers perform far less construction work in Michigan than do

non-union construction workers.[2] The wages paid to this minority of workers under collective bargaining agreements are well above industry average. Since those high rates found in collective bargaining agreements are used exclusively to set the rates established by the CIS on prevailing wage projects, the "prevailing" wages under the Act are always far above the *average* for the industry. Thus, it cannot be said that they are truly "prevailing." Since trade unions are effectively able to force their exorbitant wage and fringe benefit rates on all publicly funded construction projects in Michigan through application of the PWA, the overall impact of the Act is to increase the cost to the government for public works construction projects over what they would cost in the open market. The Mackinac Center for Public Policy has concluded that these unnecessary increased costs to Michigan taxpayers amount to over 5% of the annual revenue raised by the Michigan Individual Income Tax. Richard Vedder, "Michigan's Prevailing Wage Law and its Effect on Government Spending and Construction Employment," Mackinac Center for Public Policy, 1999, pp. 12-13.

The PWA's automatic and exclusive adoption of local union agreement rates as the prevailing rates necessarily results in the incorporation of the confusing union jurisdiction rules and local union job classification system. Such job classifications are not necessarily logical. Moreover, because the wages and fringe benefits required to be paid to employees subject to the Act are based upon the employee's job classification, contractors performing prevailing wage work must have an understanding of union trade jurisdiction rules to meet the contractor's legal obligations. Union jurisdiction issues arise where one union, such as the Painters union, claims that a particular form of work (such as applying waterproofing sealant to the exterior of a

[2]According to the Federal Bureau of Labor Statistics, less than 18% of construction workers in 2002 were represented by any union. www.bls.gov.

concrete building) is reserved for its union members, whereas another union, such as the Laborers' union, contends that its members should perform that work. The result is confusion by the contractor over the appropriate classification and union trade jurisdiction to use for the performance of the work on the prevailing wage project. Unfortunately, the classification and/or jurisdictional rules of unions setting the prevailing wage obligations are never found within collective bargaining agreements, but rather are the product of prior arbitration decisions, unwritten past practice, or back room verbal agreements. These rules are not available to non-union contractors, the public or, for that matter, to the CIS. Due to the lack of notice inherent in the system designed by the legislature through the Act, contractors are not able to determine with any degree of certainty that their classifications of workers on prevailing wage projects are correct in relation to the applicable collective bargaining agreements.

The matter is complicated further by the fact that work performed on the job might not have a corresponding classification on the applicable wage report. Should a dispute arise over the use of a particular classification, which always occurs *after the performance of the work*, the CIS will review the pertinent collective bargaining agreements and interview union business agents and union contractors to determine which classification and wage rate should have been used. Obviously, the Act requires the interpretation of local collective bargaining agreement provisions and other understandings of unions and union employers far beyond the mere identification of particular wage and fringe benefit rates.

Verification of whether a non-union contractor is in compliance with the Act on a prevailing wage project necessarily implicates the applicable collective bargaining agreement. When a contractor has been charged with violation of the Act, the convoluted and ambiguous provisions of the collective bargaining agreement, along with the unwritten understandings and

practices of the unions and union contractors, become the standards by which the non-union contractor is judged. Under Michigan law, such vague and ever-changing standards do not pass constitutional muster and render the Act invalid.

ARGUMENTS

A. THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED BECAUSE THE COURT COMMITTED CLEAR LEGAL ERROR WHEN IT DETERMINED THERE IS NO CASE OR CONTROVERSY UNDER M.C.R. 2.605 IN THIS PRESENT MATTER.

1. Standard of Review

ABC contends that the Court of Appeals committed reversible legal error in determining, *sua sponte*, that ABC has failed to present an actual case or controversy under Michigan's declaratory judgment rule, M.C.R. 2.605(A), such that there is no subject matter jurisdiction of this case in the Midland County Circuit Court. As this Supreme Court made clear in Lapeer County Clerk v. Lapeer Circuit Judges, 465 Mich 559, 566 (2002), "the issue of subject matter jurisdiction turns on questions of interpretation of statutes and court rules, which [the Supreme Court] review[s] *de novo*." See also, Hazle v. Ford Motor Company, 464 Mich 456, 461 (2001); Brown v. Michigan Health Care Corp., 463 Mich 368, 374 (2000); and McAuley v. General Motors Corp., 457 Mich 513, 518 (1998).

2. The Court of Appeals' Decision Constitutes Reversible Error Because the Court Applied an Erroneous Legal Standard Requiring "Actual or Threatened Prosecution" in Determining Subject Matter Jurisdiction When Directly Applicable, Binding Case Law Clearly Shows that a Case or Controversy Providing Jurisdiction Does Exist in this Case by Virtue of the Fact that ABC Members Must Conform Their Business Practices to the Mandates of the PWA or Face Potential Criminal Prosecution.

ABC has sought a declaratory judgment through the Midland County Circuit Court requesting that the Court enjoin the CIS from processing prevailing wage complaints and enjoin the Midland County Prosecutor from enforcing the Act through its criminal enforcement mechanisms. A declaratory action is appropriate here under M.C.R. 2.605 because ABC is seeking to resolve the issue of whether or not the PWA is constitutionally infirm *before* any of its members performing prevailing wage work in Midland County decide to deliberately disregard the Act's requirements on such jobs and thereby subject themselves to investigation by the CIS and criminal prosecution by Prosecutor Donker. The courts universally agree that a primary purpose of a declaratory action is to resolve disputed matters before they ripen into violations of law. The declaratory judgment rule was instituted by the Michigan Supreme Court precisely so that plaintiffs, such as ABC in the instant case, would not have to wait until an actual injury or violation of law occurs before seeking a clarification of their rights and duties under a state law in dispute. Clearly, declaratory judgment is an appropriate form of relief in this case because ABC members who perform work subject to the PWA face a real threat of criminal prosecution and, thus, have presented an "actual controversy" to the lower court under M.C.R. 2.605.

In its August 5, 2003, Opinion, the Court of Appeals determined that there is no actual controversy present in this case because, according to the Court, ABC had not demonstrated an "actual or threatened *prosecution* based on violation of the PWA." (Exb. A, p. 10). (Emphasis added). However, by requiring an actual or threatened *prosecution* to establish a cause or controversy in this present declaratory action, the Court has applied an incorrect legal standard, which in and of itself constitutes reversible error. As is discussed at length, *infra*, the standard of imminent prosecution adopted by this panel of the Court of Appeals has been specifically rejected by other panels of the Court of Appeals.

ABC does not refute that the "actual controversy" requirement must be satisfied in order to proceed with its lawsuit. However, ABC does take issue with the Court of Appeals as to the *critical issue of the* ***meaning*** *of the term "actual controversy"* under M.C.R. 2.605. Significantly, when the issue concerning whether ABC had raised a true case or controversy had come before the trial court on motion by Defendant Donker, ABC demonstrated to Midland Circuit Judge Ludington that a showing of imminent prosecution apart from the underlying criminal enforcement mechanisms of the challenged statute is ***not*** necessary for a party to seek relief from the courts through declaratory judgment. In his motion, Defendant Donker referenced Strager v. Wayne County Prosecuting Attorney, 10 Mich App 166 (1968), for the proposition that declaratory relief in cases involving a criminal statute are "predicated upon an *actual* threat of prosecutorial action." (Emphasis in original). However, these cases do **not** stand for the proposition that confirmation or notice of potential criminal action by a prosecutor beyond that provided under the statute itself is ***necessary*** for an "actual controversy" to exist. Quite the opposite. *Strager, for example, makes clear that an "actual controversy" necessary for a plaintiff to invoke the declaratory judgment rule is satisfied by the very fact that the statute being challenged contains criminal penalties which would be enforced against the plaintiff for violations of that statute.* ***No confirmation of imminent prosecution is required.***

In Strager, which was decided under facts similar to the present case, the plaintiff received an informal complaint from the Wayne County Prosecutor alleging that the plaintiff's proprietary business operation was in violation of Michigan's Home Improvement Finance Act. That statute declares willful violations to constitute a misdemeanor, punishable by fine or imprisonment. *Id.* at 168-169. The plaintiff filed a declaratory action seeking to enjoin the prosecutor from enforcing the act on the basis that the law was "arbitrary, capricious and

unreasonable," and thus, unconstitutional. Id. at 168. The prosecutor responded with a motion to dismiss. After hearing the motion, the court ruled that declaratory relief was improper and that, even if it were proper, the action was "premature because no prosecution against [the plaintiff] had yet been commenced." Id. at 169.

The Court of Appeals reversed. In doing so, the court first addressed the fact that declaratory actions are to be used liberally in the Michigan court system. It ruled:

> Initially, we note that GCR 1963, 521 was *intended to provide the "**broadest** type of declaratory judgment procedure*." [Footnote omitted] Id. (Emphasis added).

The court then determined that the facts of the case were tailor-made for a declaratory judgment action. In this regard, it ruled:

> In Michigan, legislation regulating business practices and providing criminal penalties for violation has been successfully challenged in actions seeking declaratory relief. (Citations omitted). In other cases, the Supreme Court reached the merits of actions seeking declaratory relief concerning such legislation and declared the legislation valid. (Citations omitted).
>
> ***
>
> *"A declaratory action is a proper remedy to test the validity of a criminal statute where it affects one in his trade, business or occupation."* 2 Anderson, Actions For Declaratory Judgments (2d Ed, 1951), at 624, p 1436. ***To afford a businessman relief in such a situation without having first to be arrested is one of the functions of the declaratory judgment procedure.*** (Citations omitted). Id. at 170-171. (Emphasis added).

The court turned next to the argument of the Attorney General (who had intervened at the appellate level) that there was no "actual controversy" presented to support the declaratory action. In this respect, the court ruled:

> The plaintiff may justifiably assume public officials will do their duty. [Footnote: *"The danger of a criminal penalty attached by law to the performance of an act affords those affected the necessary legal interest in a judgment raising the issue of validity, immunity, or status. The threat to enforce the statute seems hardly necessary for public officials are presumed to do their duty. The plaintiff need*

only show that his position is jeopardized by the statute." Borchard, Declaratory Judgments (2d Ed, 1941), p 66]. ***Plaintiff's complaint was not premature.***

It is not disputed that plaintiff's business is directly and substantially affected by the home improvement finance act. An "actual controversy" is presented. See 22 Am Jur 2d, Declaratory Judgments at 11. *Id.* at 172-173. (Emphasis added).

In this case, the plaintiff's business was affected by a Michigan statute which the plaintiff believed was unconstitutional. Since any conduct of the plaintiff subsequently found to violate that law would place him at risk of criminal prosecution by the Wayne County Prosecutor, the plaintiff could properly petition the Court for a declaratory judgment on the constitutionality of the Act. The fact that the Wayne County Prosecutor had reminded the plaintiff of the potential criminal penalties contained in the statute was not determinative of whether an "actual controversy" existed or not. As the Court held, it was *"the danger of a criminal penalty* ***attached by law*** *to the performance of an act which affords the necessary legal interest in a [declaratory] judgment."* *Id.* (Emphasis added).

Like the plaintiff in Strager, ABC members in the present case are required to abide by the PWA — a criminal law governing their business practices. *Id.* at 168-170. Like the plaintiff in Strager, ABC members believe the state law at issue is unconstitutional. *Id.* at 168. Like the plaintiff in Strager, ABC members have sought declaratory relief to challenge the law they believe is unconstitutional and unenforceable. *Id.* Like the plaintiff in Strager, ABC has named the county prosecutor as a defendant because the local prosecutor is charged with enforcing the statute. *Id.* The *only* factual difference between Strager and the present case is that the plaintiff in Strager received a letter from the Wayne County Prosecutor reminding him that he faced criminal penalties for failure to abide by the Home Improvement Finance Act. *Id.* at 172. In the present case, the Midland County Prosecutor has not issued any such letters to ABC members

inasmuch as no violations of the PWA have ever been forwarded to him by the CIS. (However, the CIS has routinely referred alleged PWA violations of ABC members to other local prosecutors.) Under Strager, this factual omission is of no consequence. The fact that the Wayne County Prosecutor had reminded the plaintiff of the potential criminal penalties contained in the statute was *not determinative* of whether an "actual controversy" existed or not. Again, as the court made clear in Strager, it was *"the danger of a criminal penalty* ***attached by law*** *to the performance of an act which affords the necessary legal interest in a [declaratory] judgment"* because ***"public officials are presumed to do their duty."*** Id. at 173.

It would seem the Court of Appeals put forth minimal effort in research before arriving at its critical decision to dismiss ABC's lawsuit, as the Strager case is conspicuously absent from the Court's August 5, 2003, Opinion *despite it being directly on point.* The lack of adequate research and resulting erroneous ruling by this panel of the Court of Appeals is particularly obvious when one considers that the Strager ruling has been discussed and followed by a subsequent Michigan Court of Appeals case also conspicuously absent from the Court's Opinion. In Kalamazoo PSA v. City of Kalamazoo, 130 Mich App 513 (1983), the City of Kalamazoo and the union representing city firefighters together sought a declaratory judgment on whether a term of their collective bargaining agreement violated the Fire Department Hours of Labor Act, M.C.L. 123.841, for which criminal misdemeanor penalties could be assessed. The trial court ruled that their agreement was in violation of the act and both parties appealed. Id. at 516.

The Court of Appeals addressed whether the trial court should have granted declaratory relief in the first place. It ruled as follows:

> Because GCR 1963, 521 was intended to provide the ***broadest type of declaratory judgment procedure possible*** and is remedial, it is to be ***liberally construed*** in order to make courts more accessible to interested parties. Comm'r of Revenue v.

Grand Trunk W R Co, 326 Mich 371 (1949); Bloomfield Hills v Ziegelman, 110 Mich App 530 (1981), rev'd on other grounds, 413 Mich 911 (1982); Official Committee Comment to GCR 1963, 521.

In Strager v Wayne County Prosecuting Attorney, 10 Mich App 166, 170-171 (1968), it was held that a declaratory judgment is a proper remedy to test the validity of a criminal statute where that statute affects the trade or business of the interested parties. *Id.* at 517. (Emphasis added.)

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Further, Strager, p 171, states that ***affording businessmen declaratory relief in such situations without having first to be arrested is one of the functions of the declaratory judgment procedure***. Defendant's City Manager and City Commissioners could be subject to fines and/or imprisonment should defendant be found to be in violation of the act. Affording defendant some guidance so as to avoid this situation is, according to Strager, one of the functions of the declaratory judgment procedure.

Michigan courts have consistently upheld the right to seek declaratory relief where interested parties have sought the guidance of courts prior to there being an actual violation of a statute. See Grocer's Dairy Co v Dep't of Agriculture Director, 377 Mich 71 (1966); Arlan's Department Stores, Inc v Attorney General, 374 Mich 70 (1964); Levy v Pontiac, 331 Mich 100 (1951); Carolene Products Co v Thomson, 276 Mich 172 (1936); National Amusement Co v Johnson, 270 Mich 613 (1935). The fact that no party is yet in violation of the act does not deny the parties the right to declaratory relief. One test of the right to institute such proceedings is the necessity of present adjudication as a guide for interested parties' future conduct in order to preserve their legal rights. Bane v Pontiac Twp, 343 Mich 481 (1955); Village of Breedsville v Columbia Twp, 312 Mich 47 (1945); Updegraff v Attorney General, 298 Mich 48 (1941); Rott v Standard Accident Ins Co, 299 Mich 384 (1941).

This is precisely why the parties seek declaratory relief; they seek guidance from this Court as to whether their proposed hours of work schedule would run afoul of the act. *Id.* at 517-518. (Emphasis added).

Kalamazoo PSA is significant not only because another panel of the Court of Appeals specifically followed and applied the holding of Strager, *supra*, to the facts in common with the case on appeal before it, but also because it followed and applied the holding of Strager *despite the fact that the case before it did* ***not involve any express, actual threat of criminal prosecution***

from the party charged with enforcing the Hours of Labor Act! Thus, Kalamazoo PSA makes clear beyond any doubt that actual notice of prosecution to a plaintiff by the party charged with enforcing a criminal statute is ***not*** required to satisfy the "actual controversy" requirement of M.C.R. 2.605. All that is required is a credible showing that the ***"plaintiff's business is directly and substantially affected by the [criminal statute being challenged].*** Strager, *supra*, at 173, (emphasis added); Kalamazoo PSA, *supra* at 517-518.

The federal courts are in accord with Kalamazoo and Strager.[3] In United Food and Commercial Workers International Union, AFL-CIO v. IBP, 857 F.2d 422, 427-28 (8th Cir. 1988), the federal Court of Appeals ruled that, when a party challenges the constitutionality of a criminal statute through a declaratory action, the applicability of criminal sanctions to a plaintiff's conduct is all that is necessary for an "actual controversy" to exist. The Court also found that commentators agree with that view:

> Commentators agree with this result: "where the enforcement of a regulatory statute would cause plaintiff to sustain a direct injury, the action may properly be maintained, ***whether or not the public officer has 'threatened' suit; the presence of the statute is threat enough***, at least where the challenged statute is not moribund. 6A Moore's Federal Practice, paragraph 57.18[2] at 57-189 (2d Ed 1987)." *Id.* Emphasis added).

Furthermore, prior to this ruling of the Eighth Circuit, the United States Supreme Court had determined in Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 292-293, 60 L.Ed 2d 895, 99 S.Ct. 2301 (1979) that a criminal statute regulating agricultural employment relations in Arizona could properly be attacked on declaratory judgment by plaintiffs who could have been prosecuted under that law. *Although the criminal enforcement measures of the statute in*

[3] Because the federal and state declaratory judgment rules are virtually identical, the state courts look to federal precedent for guidance. Indeed, this honorable Michigan Supreme Court has stated: "Because both the federal declaratory judgment statute and the Michigan declaratory judgment court rule require an actual controversy, we look to federal interpretation of the federal statute as instructive." Allstate Insurance Co. v. Hayes, 442 Mich 56, 70 (1993).

*question had **never** been enforced*, the Court found sufficient "controversy" to enable the plaintiff to seek a declaratory judgment. Id. at 302.[4]

Decisions of other federal courts demonstrate that where applicability of the declaratory judgment rule is at issue in a case involving a challenge to a criminal statute, the burden rests with the defendant(s) to show that the state criminal law in question is moribund or otherwise will not be enforced. In Caribbean Int'l News Corp v. Agostini, 12 F.Supp 2d 206, 212-13 (D.C. P.R., 1998), the federal District Court held:

> A party must show that the fear of prosecution is not merely 'imaginary or wholly speculative.' Babbitt, 442 U.S. at 302, 99 S. Ct. at 2310-11. This threshold, however, is ***not** a high one*; it is *'quite forgiving.'* [New Hampshire Right to Life Political Action Comm v.] Gardner, 99 F.3d [8], 14. A credible threat of prosecution may exist even though the challenged statute has never been enforced. *Babbitt*, 442 U.S. at 302, 99 S. Ct. at 2310-11. Where the circumstances indicate that a plaintiff will either be in violation of a statute which limits its normal conduct or be forced to engage in self-censorship, ***a pre-enforcement challenge is appropriate unless the state demonstrates that the statute is moribund or will not be enforced.*** Gardner, 99 F.3d at 16. ***Absent compelling evidence to the contrary, the court should assume that there is a credible threat of prosecution.*** Id. at 15. *If the state has not disavowed any intention of enforcing the statute at issue, the plaintiff will generally be justified in fearing prosecution.* (Emphasis added).

See also, Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 393, 108 S.Ct. 636, 98 L.Ed. 2d 782 (1988). In this present matter, the Court of Appeals did not even mention the Defendants had a burden of proving that local prosecutors such as Prosecutor Donker have disavowed an interest in enforcing the PWA through criminal prosecution, let alone hold the Defendants to proving such a point.

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[4] See also, Epperson v. Arkansas, 393 U.S. 97 (1968); Doe v. Bolton, 410 U.S. 179 (1973); KVUE, Inc v. Moore, 709 F.2d 922 (5th Cir. 1983), *aff'd* 465 U.S. 1092 (1984); International Society of Krishna Consciousness v. Eaves, 601 F.2d 809 (5th Cir. 1979); Pursley v. City of Fayetteville, 820 F.2d 951 (8th Cir. 1987); Blatnik Co v. Ketola, 587 F.2d 379 (8th Cir. 1978); Seattle School District No 1 v. Washington, 633 F.2d 1338, 1342 n. 1 (9th Cir. 1980), *aff'd*, 458 U.S. 457, 73 L.Ed 2d 896, 102 S. Ct. 3187 (1982).

Not only was the Court of Appeals dead wrong when it applied an "imminent prosecution" standard in dismissing ABC's lawsuit — an error the Court refused to correct on reconsideration after ABC presented Strager, Kalamazoo and other applicable case law – but ABC can show that it meets the legally correct requirements for a declaratory ruling as to the constitutionality of the PWA. Through affidavits of ABC members Gary Tenaglia and Lee Goulet, ABC can show that ABC members perform (or desire to perform) work on state-funded construction projects and that the business conduct of ABC members is therefore regulated by the PWA. (Exbs. F and G). The PWA is enforced exclusively through criminal prosecution — *a procedure which the Defendants, including Midland County Prosecutor Donker, have* ***not disavowed.*** Absent a clear declaration *on the record* from Prosecutor Donker that he would never criminally enforce the PWA against ABC members, ABC members performing prevailing wage work within Midland County shall continue to maintain a reasonable and justifiable fear of criminal prosecution should they violate any of the provisions of the PWA. As long as such reasonable apprehension exists, ABC members performing prevailing wage work in Midland County will remain able to satisfy the "actual controversy" requirement of a declaratory judgment action under M.C.R. 2.605.

Moreover, while ABC has not uncovered any tangible "threats" of criminal action by Midland County Prosecutor Donker, ABC has come forward with evidence of prior threats of criminal enforcement of PWA provisions against ABC members by other prosecutors in Michigan. In the affidavits submitted by ABC, Mr. Gary Tenaglia averred that the CIS had forwarded a 27 count complaint against him and his company to the Macomb County Prosecutor. While the matter was reinvestigated by the CIS and whittled down to an allegation of only a pair of minor violations ($36.90 total), the Macomb County Prosecutor's office has refused to dismiss

its criminal investigation. (Exb. F, p 7). Likewise, Mr. Lee Goulet averred in his affidavit that a CIS investigation of his company concluded with the CIS advising claimants to pursue their claims criminally through the Macomb County Prosecutor. (Exb. G, p 11). The Defendant CIS's own official documents show that claimants are encouraged to seek out their local county prosecutors for criminal enforcement of their claims under the Act. (Exb. H). Therefore, even if ABC was required to show evidence of prosecutorial action in order to proceed with its case, (which it is not, as the criminal penalties expressed in the PWA itself are enough), it is patently clear that ABC member have in the past, and will continue in the future, to be in real danger of criminal prosecution for alleged violations of the PWA. The fact that ABC has not come forward with an actual or imminent prosecution in Midland County is of no consequence.

When this jurisdictional issue was presented and briefed to the Midland Circuit Court, Judge Ludington issued a thorough, well-reasoned written opinion discussing and analyzing the relevant case law, including discussion and analysis of the Strager, Kalamazoo PSA and United Food and Commercial Workers cases. (Exb. G, pp. 22-36). Referencing the legal obligations of Defendants Donker and CIS to criminally enforce the PWA, he ultimately ruled that ABC had presented a legitimate case or controversy as contemplated by M.C.R. 2.605. Had the Court of Appeals examined the facts of this case in the light of pertinent case law, it would not have applied an erroneous "actual or threatened prosecution" standard for finding an actual case or controversy. Its failure to do so constitutes clear error.

How the Court of Appeals arrived at its "actual or threatened prosecution" standard is anyone's guess. In contrast to the applicable precedent relied upon by the Midland Circuit Court, the Court of Appeals relied almost exclusively on the generalized language of a single case of the Michigan Supreme Court, BCBSM v. Governor, 422 Mich 1 (1985), wherein the

Supreme Court did not find an actual controversy in a "vagueness" challenge to a Michigan statute because the plaintiff had not shown an "actual adversarial relationship" to yet exist in that case. However, the BCBSM case is readily distinguishable from the present case because the BCBSM case did ***not*** *involve a statute enforced through criminal prosecution*, whereas the statute challenged in this present case, the PWA, is enforced solely through criminal means. Hence, its application to the jurisdictional issue presented in this case is, at most, only marginally relevant and certainly must give way to the directly applicable case precedent of Strager, Kalamazoo PSA and United Food and Commercial Workers.

Moreover, in BCBSM, the plaintiff brought a declaratory action based on what it believed might be a difference of opinion on the application of certain terms in a recently enacted but not-yet-enforced civil statute regulating its business conduct. The Court dismissed BCBSM's vagueness challenge to the new law because BCBSM had only speculated and had not shown that there was "an actual adversarial relationship" yet existing between it and the Insurance Commissioner. *Id.* Of course, in the present case, there is a clear dispute between the CIS and ABC over whether the CIS may enforce the Act as it has been doing over the past 35 years. ABC and the CIS are at odds over whether the provisions of union collective bargaining agreements along with unwritten "understandings" between unions and union contractors may be enforced against ABC members who have no notice of what those provisions and understandings may be prior to setting their course of conduct on prevailing wage projects. Clearly, the CIS takes the position that it must enforce the Act in such a manner, while ABC contends that it may not. The speculation evident in BCBSM over whether the parties were at odds over BCBSM's obligations under the new civil statute is vastly different from the very real and justifiable fear that non-union contractors have on prevailing wage projects that their conduct will not meet the

standards of collective bargaining agreements and unwritten understandings to which they have been provided no notice.

Finally, the plaintiff in BCBSM raised numerous counts in its declaratory judgment action, one of which consisted of a challenge to an underlying statute based on an unlawful delegation of legislative authority theory (similar to this present case). Significantly, this honorable Supreme Court ***did*** *find an actual controversy with respect to that claim.*[5] The failure of the Court of Appeals to discuss or even mention this aspect of the BCBSM case further demonstrates its lack of any grasp whatsoever of the legal standards at issue when determining the existence of an actual controversy to a criminally enforced statute under M.C.R. 2.605.

This honorable Supreme Court should grant ABC's Application for Leave to Appeal because the Court of Appeals has dismissed ABC's case due to hasty application of a legally erroneous "actual or threatened prosecution" standard. (Exb A, pp. 10, 14). The Court of Appeals did not apply directly applicable case law interpreting M.C.R. 2.605 and, instead, simply referenced general language from a few generic "case or controversy" decisions, declared ABC's declaratory suit as raising nothing more than hypothetical controversies, and dismissed the case. Had the Court reconsidered the matter pursuant to ABC's timely filed Motion for Reconsideration and allowed ABC an opportunity to show the Court the error of its ways, this Application for Leave to Appeal would not have been necessary. Since the Court of Appeals refused to reconsider its ill-conceived dismissal of ABC's case, this honorable Supreme Court should grant this instant Application for Leave to Appeal.

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[5] In fact, this Supreme Court actually ruled in favor of the plaintiff, BCBSM, on this issue. At page 55 of its Opinion, the Court ruled:

> Thus, the lack of standards defining and directing the Insurance Commissioner's and the actuary panel's authority renders this dispute resolution mechanism constitutionally defective.

B. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT FIRST DETERMINED THAT IT LACKED SUBJECT MATTER JURISDICTION OVER THIS DISPUTE AND THEN WENT ON TO CONTRADICTORILY MAKE ERRONEOUS SELECTIVE DETERMINATIONS WITH REGARD TO SOME OF THE SUBSTANTIVE ISSUES PRESENTED IN THE CASE

1. Standard of Review

This Application also concerns whether the Court of Appeals committed legal error when it first ruled it lacked subject matter jurisdiction to decide the substantive issues in this case and then, in *dicta*, made factual and legal determinations resulting in an erroneous conclusion that ABC's constitutional challenges to the PWA where without merit in any event. Since constitutional challenges to Michigan statutes are questions of law, they are reviewed *de novo* by the Supreme Court. Robertson v. DaimlerChrysler Corp., 465 Mich 732, 739 (2002); Frank W. Lynch Co. v. Flex Technologies, Inc., 463 Mich 578, 583 (2001); People v. Rodriguez, 463 Mich 466, 471 (2000).

2. The Court of Appeals Committed an Error of Law When it First Decided it Lacked Subject Matter Jurisdiction Over this Case and Then Subsequently Expressed in *Dicta* that it Would Not Find the PWA to be Unconstitutionally Vague in Any Event.

The Court of Appeals first determined that there is no cause or controversy presented in this case and that it therefore lacked jurisdiction over the matter. The Court nonetheless selectively addressed substantive issues contained in the Appeal and Cross-Appeal and made determinations regarding the viability of arguments and case law presented. With respect to ABC's contention that the criminally enforced PWA is unconstitutionally vague, the Court of Appeals made at least two erroneous rulings in *dicta*.[6] ABC submits that the Court erred not

[6] In footnote 7, (Exb. A), the Court concluded that ABC cannot make a constitutional vagueness challenge to the PWA on its face because "the PWA does not implicate constitutionally protected conduct." Also at footnote 7, the Court concluded that ABC's vagueness claim must fail because ABC

only in making such rulings when it had already determined it lacked jurisdiction in the case, but that it erred again with respect to the substance of its rulings in *dicta*.

Michigan case law is clear that "having determined that it has no jurisdiction, a court should not proceed further except to dismiss the action." EDS v. Township of Flint, 253 Mich App 538 (2002). In fact, this Supreme Court has clearly stated that "[w]hen a court is without jurisdiction of the subject matter, ***any action with respect to such a cause, other than to dismiss it, is absolutely void.***" Fox v. Board of Regents of the University of Michigan, 375 Mich 238 (1964) (emphasis added). *See also* Lehman v. Lehman, 312 Mich 102 (1945); Bowie v. Arder, 441 Mich 23 (1992). Therefore, upon a finding that the Court of Appeals lacked jurisdiction over the present matter, the Court was required to dismiss the action and do nothing more. In spite of this clear obligation to do nothing other than dismiss the case upon a finding of a lack of jurisdiction, the Court inexplicably chose to provide selective evaluation and commentary regarding the applicability of case law presented by the parties and the viability of ABC's constitutional claims. The Court's legal meanderings are inherently contradictory and constitute legal error which this honorable Supreme Court should reverse on appeal.

Not only has the Court of Appeals expressed more than it should have, but it compounded its error by being wrong on the substance of its legal conclusions. Citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 445 U.S. 489; 102 S.Ct 1186; 71 L Ed. 2d 362 (1982), the Court erroneously determined in *dicta* that ABC has failed to allege a proper vagueness challenge to the criminally enforced PWA on its face because the PWA does not impinge upon constitutionally protected conduct and, because it does not, that ABC's claim is defective for failure to show that the Act is impermissibly vague in all of its applications. The

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"has not alleged any 'facts of the case at hand' which would allow [the Court of Appeals] to analyze an 'as applied' challenge in anything but a hypothetical context."

Court is clearly wrong, however, because ABC ***has*** alleged that the statute implicates constitutional guarantees, specifically the guarantee of due process of law. Moreover, case law of more recent vintage than Hoffman Estates, *supra*, from the United States Supreme Court, the Sixth Circuit Court of Appeals and the Federal District Court for the Eastern District of Michigan reveals that *facial challenges to impermissibly vague statutes can be brought on due process grounds.* Chicago v. Morales, 527 U.S. 41, 53, 64-65; 119 S.Ct 1849; 144 L Ed. 2d67 (1999) (facial attack can be mounted pursuant to the First Amendment and the Due Process Clause); Kolender v. Lawson, 461 U.S.352, 358; 75 L Ed. 2d 903; 103 S.Ct 1855 (1983 ("we conclude [that the statute] is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute."); Springfield Armory, Inc., v. City of Columbus, 29 F.3d 250, 252-54 (6th Cir. 1994) (rejecting district court "as applied" analysis of statute with criminal penalties and concluding that particular statute was unconstitutionally vague on its face); Staley v. Jones, 108 F.Supp 2d 777, 782 (ED Mich, 2000).

The Michigan Constitution provides for due process of law not only in court procedure, but also to legislation in criminal matters. These guarantees have been described in the Michigan Law and Practice Encyclopedia as follows:

> Generally, due process requires that legislation provide adequate notice to persons of ordinary intelligence of the conduct which is illegal. Thus, criminal legislation must be sufficiently explicit to inform those subject to its provisions as to the conduct which renders them liable to its penalties.
>
> It follows that criminal legislation that is vague may be violative of the due process guaranty. Accordingly, legislation which is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, or that leaves the public uncertain as to the conduct that it prohibits, or leaves the judges and jurors free to decide without any legally fixed standards

what is prohibited and what is not in each case, violates due process. M.L.P., Constitutional Law, Sec. 364. (Citations omitted).

The standards for evaluating vagueness were enunciated by the United States Supreme Court in Grayned v. City of Rockford, 408 U.S. 104, 108-109; 92 S.Ct 2294; 33 L.Ed2d 222 (1972) as follows:

> Vague laws offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

Likewise, in People v. Lino, 447 Mich 567, 575-576 (1994), the Supreme Court of Michigan set the parameters for a claim of constitutional vagueness as follows:

> In order to pass constitutional muster, a penal statute must define the criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357; 103 S.Ct. 1855; 75 L.Ed.2d 903 (1983) (citations omitted). ***

Accordingly, statutes requiring payment of "prevailing wage rates" to construction employees working on government-funded projects which imposed criminal sanctions for violation, have been declared invalid in many cases on vagueness grounds. See, e.g., Connally v. General Construction Co., 269 U.S. 385; 70 L.Ed 322; 46 S.Ct 126 (1926); State v. Jay J. Garfield Bldg. Co., 39 Ariz 45; 3 P.2d 983 (1931); State v. Blaser, 138 Kan 447; 26 P.2d 593 (1933); Commonwealth v. Daniel O'Connell's & Sons, 281 Mass 402; 183 NE 839 (1933). In Connally, *supra*, the United State Supreme Court was asked to review the constitutionality of a criminally-enforced prevailing wage law in Oklahoma requiring payment to workmen of "not

less than the current rate of per diem wages in the locality where the work is performed." Id. at 388. Due to the varying nature of local wages and the imprecision of the term "locality" within the statute, the Court ruled that contractors were unable to ascertain with any reasonable degree of certainty whether or not their pay practices complied with the statute. Id. at 393-395.

In the present case, Michigan's criminally enforced PWA does *not* provide adequate, constitutionally mandated certainty in the standards upon which ABC contractors would be judged in a criminal trial for failure to meet payment obligations of the Act. Not only does the Act fail to adequately define important terms of the statute, but administration and enforcement of the Act necessarily depends on *interpretation* of various collective bargaining agreements between trade unions and union construction contractors. These agreements are not only extremely difficult to follow on their face, but they are constantly evolving and are subject to modification by unwritten practices between the unions and union contractors. All of these factors make it nearly impossible for non-union contractors to maintain any confidence that they are in compliance with the Act with respect to any given prevailing wage project.[7]

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[7] It is virtually black-letter constitutional law at both the state and federal levels that statute-defining crimes are to be ***strictly construed*** and must prescribe the elements of the offense with reasonable certainty and so explicitly that reasonable persons subject to the criminal penalties may know precisely what acts to avoid. Connally v. General Construction Co., 269 U.S. 385; 46 S.Ct 126; 70 L.Ed 322 (1926; People v. Wiegand, 369 Mich 204 (1963); People v. Thompson, 259 Mich 109 (1932). While the Court of Appeals did not comment on this issue, the Intervenors have claimed that a "less strict vagueness test" should be applied to ABC's constitutional challenge of the PWA. According to the MSBCTC, Western Michigan University v. State of Michigan, 455 Mich 531, 535-536 (1997) holds that the PWA is not enforced solely as a criminal statute, but rather, is enforced civilly as well, so that all of its provisions should be construed liberally, even its criminal enforcement mechanism. However, an accurate reading of Western Michigan shows that the Supreme Court merely recognized that the statute has remedial goals and when *determining application of the Act in furtherance of those remedial goals*, the Act is to be given liberal construction. It expressed no opinion on the criminal enforcement aspect of the Act. A review of Michigan case law shows that the Court has universally applied strict construction in the examination of ***criminal enforcement*** of remedial statutes. Arlan's Department Store, Inc. v. Attorney General, 374 Mich 70 (1964); Bejger v. Zawadzki, 252 Mich 14, 17 (1930), citing Lagler v. Bye, 42 Ind. App. 592; 85 NE 36 ("... a statute may be penal in one part and remedial in another, in which case, when it is sought to enforce the penalty, it is to be considered a penal statute, and when it is sought to enforce the remedy, it is

Initially, it should be noted that the Act fails to adequately define key terms. The statute does not define "wages," "fringe benefits," "overtime," "apprentice" or journeyman" – all extremely important and fundamental terms of the Act.[8] In an attempt to add some measure of definition to the statute, the CIS established definitions of such terms as "overtime" and "fringe benefits" based on similar definitions of those terms found in other Michigan labor laws. However, when this practice was challenged by the MSBCTC, the Michigan Court of Appeals ruled that the CIS had no discretion to define terms in any way at variance to trade union collective bargaining agreements. In MSBCTC and Resteel Contractors Assoc. v. Perry, 241 Mich App 406, 416 (2000) ("Resteel"), the Michigan Court of Appeals reviewed whether the CIS possessed the authority to establish overtime and other particular fringe benefit rates based on definitions of these terms in various state labor statutes. Noting that the PWA did not define the terms "overtime" or "fringe benefit," the Court nonetheless held that the CIS did not have such authority. *Id.* at 411, 413. In fact, the Court specifically held that the CIS has no authority whatsoever to depart from the collective bargaining agreements and understandings between trade unions and union contractors in determining the standards under which all contractors must abide on prevailing wage projects. Citing the Court's previous holding in West Ottawa Public Schools v. Babcock, 107 Mich App 237, 245-246 (1982), the Resteel Court ruled at 416:

> We conclude that under the plain language of the [Act], the [CIS] is without discretion to define wages, including overtime, or fringe benefits, independently

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to be considered as remedial in nature); Robinson v. Harmon, 157 Mich 272 (1909). Since ABC has sought review of the PWA with respect to its criminal enforcement as opposed to its application to a particular construction project, the Circuit Court and appellate Courts must apply strict scrutiny.

[8]Even the term "locality" (one of the few terms which is defined in the Act) is not defined with any degree of precision. "Locality" is defined as "the county, city, village, township, ***or*** school district in which the physical work on a state project is to be performed." M.C.L. 408.551(e) (Emphasis added). This definition, like that presented in Connally, sets forth a choice of various definitions and, thus, represents a definition without certainty. Connally, at 395.

> of the collective bargaining agreements in the locality. Rather, in determining prevailing wage and benefit rates, the [CIS] is bound by the wage and fringe benefit requirements found in local collective bargaining agreements.

Because the definitions of the Act must be taken directly from within scores of various trade union collective bargaining agreements throughout Michigan, non-union construction contractors such as a majority of ABC's members are not put on notice of those definitions because they have no real access to those various agreements setting forth the pertinent definitions. Because the PWA is enforced solely through criminal prosecution, it must provide adequate definition and notice of the conduct it prohibits. Lino, *supra.* The PWA does not and it, therefore, is unconstitutionally vague.

ABC has not yet been permitted to engage in any discovery. If it were, ABC would be able to show that compliance with the PWA and, conversely, proving a violation of the Act, necessarily requires *interpretation* of construction trade union collective bargaining agreements. Since the Act elevates these union collective bargaining agreements as the standard by which all contractors working on prevailing wage projects are to be judged, those collective bargaining agreements must be clear and must provide sufficiently clear standards by which contractors working on prevailing wage projects might gauge their conduct so as to avoid criminal prosecution.[9] Unfortunately for contractors working on prevailing wage projects, collective bargaining agreements are, by their nature, vaguely worded documents which require substantial interpretation in determining their meaning and application to any given set of facts. Thus, ABC contractors have no way of knowing whether they have properly classified and paid their employees correctly under the Act on any given project. Legislation that leaves the public

[9]This presumes that a criminal statute can ever incorporate by reference standards from a source other than a government agency and still pass constitutional muster.

uncertain as to the conduct it prohibits or leaves the judges and jurors free to decide without any legally fixed standards as to what is prohibited and what is not in each case violates due process. People v. Olsenite Corp., 80 Mich App 763, 769 (1978). The Constitution requires that a criminal law state the standards of prohibited behavior with sufficient definiteness so that a person of ordinary intelligence can intelligently choose, in advance, between lawful and unlawful options of behavior. Goulding, *supra* at 359 ("No penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."). The PWA flunks this test because it has adopted standards from the collective bargaining process which, by its nature, are vague and indefinite.

Since various skilled tradespersons (carpenters, painters, electricians, etc.) work on construction projects, the CIS must necessarily determine which classes of workers will receive which rates of pay and benefits under the various applicable collective bargaining agreements. However, determining which class of worker actually performs which type of work requires more than a mere simplistic transfer of the classification and corresponding wage and fringe benefit rates from the collective bargaining agreement onto the CIS wage report. More importantly, non-union contractors are forced to speculate as to whether their work practices on prevailing wage projects comply with the worker classification scheme reflected in the CIS wage report. This is because the adherence to the classification scheme and corresponding prevailing rates requires *interpretation* of the collective bargaining agreements and unwritten understandings and practices between unions and union contractors.

The terms of the collective bargaining agreements adopted by the CIS in establishing prevailing rates are often confusing and undecipherable on their face. CIS reports, which list the classifications of workers and their corresponding wage and fringe benefit amounts, contain

numerous classifications of workers which *only* trade unions and union contractors recognize. For example, wage reports have included such mysterious classifications as "piledriver," "tunnel mucker," "grease man," "top man on chimney," "crock layer," "bucker-up," "sheeter," and "powder monkey." (See generally, Exb. D). Some classifications seem to describe the same job, yet have different rates of pay and fringe benefits based on vague and inconclusive factors separate from the work to be performed. For example, "regular crane operators" under the "Engineers hazardous waste" category to the Midland County wage report have different rates depending, apparently, on the kind of protective equipment they use even though they are performing the same job. A crane operator wearing coveralls, safety boots, glasses or chemical splash goggles and a hard hat will be paid a combined rate of $35.34, whereas a crane operator using "the highest available level of respiratory, skin and eye protection" will be paid at a rate of $39.27. How is a contractor to know whether he has provided his crane operator "the highest available level of respiratory, skin and eye protection," thus requiring the higher rate of pay under the wage report? In order to protect himself from criminal prosecution, is he to retain a staff of safety experts to attest on a daily basis whether the safety equipment he provides to his crane operators is at "the highest available level"? The fact is that each time a contractor steps foot on a prevailing wage job and assigns an employee to operate a crane, the contractor must guess as to which classification and corresponding rates apply to the employee at any given time. Unlike an unlucky game show contestant, a contractor who guesses wrong doesn't just lose a door prize — rather, he faces criminal prosecution.

Moreover, while classifications of workers are listed in the CIS reports applicable to the job, a listing of the type of work any particular classification is supposed to perform *is not included.* Therefore, a non-union contractor is also forced to guess as to whether the type of

work performed by his employees actually fits the classifications he has assigned to those employees. For example, a non-union construction company might assign workers to perform landscaping work which includes laying pipe in the ground. Is the contractor to label his employees as "landscapers" and consider this work landscaper work? Is he to classify his employees as "plumbers" and consider it plumber work? Should he consider his employees as "laborers" based on a belief that it is general labor work?[10] The same problems occur in all aspects of construction work. Hence, at what point does a contractor consider the work of a carpenter to have ended and the work of a roofer to have begun? These questions have real-world meaning for contractors, as a wrong guess could land the contractor in jail.

Confusion also arises out of the classifications in the wage report compared to the language of the Act itself. ABC is not aware of any wage reports that include a classification for "helpers." Yet, the Act expressly mentions that the term "construction mechanics" includes "helpers." M.C.L. 408.551. A non-union contractor who employs helpers within its work crews pursuant to M.C.L. 408.551 and who then performs prevailing wage work for which there is no "helper" classification, would be subject to criminal prosecution for failure to convert his helpers into a different and artificial new classification despite the very language of the Act seemingly permitting him to use the helper classification.

The vagueness of the PWA's application of union work classifications taken from collective bargaining agreements is compounded by the fact that even the unions and union contractors often cannot agree as to which work belongs to which classification or construction

[10]Such issues are not merely hypothetical as ABC has obtained documents which show that a Kalamazoo lawn sprinkler company was threatened with criminal prosecution for mistakenly classifying its outside/underground lawn sprinkler installers as "landscapers" as opposed to "landscaper specialists." (Exb. H).

trade union. Jurisdictional disputes between unions over whether a particular type of work belongs to one union or another are a constant and ongoing source of confusion for workers, unions and contractors alike on union job sites. Because there are so many trade unions in so many localities in Michigan, the overlapping work that construction workers perform often results in disputes as to which trade should be doing which form of related work. For example, a trade jurisdiction dispute may occur over the connecting of outside underground sprinklers to the control panel of a newly constructed building. Is it the work of a plumber? Is it the work of a landscaper? Is it the work of some other trade? Because each construction trade is represented by a union, the unions go to battle over these "jurisdiction" issues on a regular basis.[11]

At least one ABC member/contractor has been subject to CIS investigation and potential prosecution based on confusion over trade jurisdiction on a prevailing wage project. In 1998, Midland Painting Co., was awarded a painting contract subject to the PWA. (Exb. G, p. 5). In addition to painting, that contract called for the application of a sealing and waterproofing material known as "Dryvit" to the exterior concrete walls of the structure, which Midland Painting Co.'s painters had applied on numerous other projects before. Since the classifications listed on the wage report for the project did not specifically identify which classification of worker was to apply Dryvit on the project, the company had its painters apply the product. (Exb. G, pp. 6-7). After the project was complete, the CIS claimed that the work properly belonged to

[11] An example has come from the National Labor Relations Board ("NLRB") where the installation of refrigerators and television sets became a battleground between the Electricians and the Carpenters on a construction project. In IBEW, Local 98, AIMM Inc., and Metro Council of Carpenters, 331 N.L.R.B. No. 156; 165 L.R.R.M. 1155 (2000), the NLRB ruled that it was the work of carpenters. Union trade jurisdiction disputes have been such a historical problem that the National Labor Relations Act was actually amended in 1947 to give the NLRB jurisdiction over such disputes or to decline jurisdiction where the unions at issue could show that they were otherwise bound to resolve such disputes through a recognized alternative dispute resolution process. June 23, 1947, c. 120, Title I, Sec. 101, 61 Stat. 136.

the Laborers' Union. Thereafter, the company learned that several unions, including the Painters, Carpenters, Lathers and Laborers' unions, had all applied Dryvit in the past and that they all were engaged in a disagreement over which union had proper "jurisdiction" of the work. (Exb. G, pp. 7, 9-10). Notwithstanding the fact that the trade jurisdiction dispute existed among at least four unions and, further, notwithstanding the fact that it was patently uncertain as to which classification of worker should have applied Dryvit on the project, the CIS nevertheless advised criminal prosecution of Midland Painting Co., for its selection of the painters classification for performance of the work. (Exb. G, p. 10).

The Michigan Supreme Court in Resteel, *supra*, confirmed that the Michigan Legislature has incorporated the classification system of collective bargaining agreements into the prevailing wage system. M.C.L. 408.554. The interplay between various collective bargaining agreements regularly leads to jurisdictional disputes between unions as to which classification of work is properly assigned which type of work. These jurisdictional disputes necessarily interject uncertainty into the system of classifying workers on prevailing wage projects. Since even the unions cannot determine with any degree of certainty which work belongs to which classification on a prevailing wage project, how can non-union contractors be held to such a determination? No person of reasonable intelligence can make such a determination because the standard shifts like the sands of the desert. Thus, contractors like Midland Painting Co., have just as much chance of guessing the appropriate classifications of workers on prevailing wage jobs as they do predicting the winner of a Friday night high school football game. Non-union contractors are not parties to and, for that matter, typically have never seen collective bargaining agreements. How can they be properly deemed to know how they operate with respect to the classification of union workers? Obviously, ABC's members are not "provided fair notice of what conduct is

prohibited" under the Act, nor are they able to protect themselves from arbitrary enforcement of the Act against them despite their earnest attempts at complying with this vague law. Goulding, Lino and Brashier, *supra*.

Complicating matters further for non-union contractors is the CIS's "hands-off" approach to the handling of classification disputes. One of the CIS's written rules concerning potential investigations of PWA complaints, rule D 9.00(2), reads in pertinent part as follows:

> The Department will not investigate:
>
> a) a dispute involving the appropriateness of a classification being utilized on a state project, other than a generic classification. The division may make a reasonable assessment to ensure the classification assigned (and corresponding rate of pay) is generally consistent with the work actually performed.
>
> b) Complaints involving jurisdictional disputes between trade classifications. (Emphasis in original)

Thus, a non-union contractor faced with a choice of two or more reasonable classifications for a particular worker will receive no help from the CIS in making the proper determination. If ever challenged on the selection of the worker's proper classification by the local prosecutor, the contractor can only hope he selected the right classification.

Whether a non-union contractor is in compliance with the wage and fringe benefits rates applicable to a prevailing wage projects depends not only upon whether he has followed all applicable classifications, but also whether he has followed all applicable pay practices identified within the collective bargaining agreements. Yet, those pay practices are almost never clearly defined in the collective bargaining agreements, and they are certainly never clearly defined in the CIS's wage report. For example, non-union contractors, through the operation of the PWA, are required to follow union-defined overtime, premium pay and holiday pay practices, among

other things. In a futile attempt to define these collectively negotiated pay practices, the CIS has developed certain guidance materials, including guidance on overtime (Exb. I) corresponding to the "Overtime" category found in the CIS published wage rates (Exb. E). These additional pay practices are not specified within the PWA itself, but ABC contractors are nevertheless required to comply with these requirements or face criminal prosecution. While ABC leaves this honorable Supreme Court to draw its own conclusions, it is ABC's position that Exhibit I is about as clear as mud.[12]

The Michigan Constitution requires more of its criminal laws. It requires that legislation provide adequate notice of the conduct which is illegal and it must not leave judges or jurors free to decide without any legally fixed standards what is prohibited and what is not in each case. Grayned, Lino and Brashier, *supra.* Since the PWA is enforced solely through criminal means, such vagueness places non-union contractors in jeopardy of losing their liberty despite their best attempts at complying with the statute on prevailing wage projects. Since constitutionally protected interests in due process are at stake each time an ABC member participates in a prevailing wage project, the decision of the Court of Appeals in *dicta* that ABC has failed to raise an adequate challenge to the vagueness of the PWA on its face is clearly erroneous.

The Court of Appeals also indicated in *dicta* at its footnote 7 that ABC has failed to raise an "as applied" challenge to the PWA because ABC has failed to present adequate "facts of the

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[12] The adoption of union contractual pay provisions, such as that found in Exhibit F, raises more questions than it answers. For example, when do weekly and, for that matter, daily overtime requirements begin and end – at the beginning of the pay period, the work week, the union-defined work day? What union-defined holidays are subject to holiday premium pay requirements – Christmas, the 1st day of deer hunting season, Ground Hog's Day? None of this information, which is necessary for ABC's compliance, is to be found within the statute, the wage report, or the CIS's Overtime Provisions. Nevertheless, non-union contractors are bound under the expressed provisions of the Act to adhere to such requirements. This lack of notice as to the standard of compliance is fatal to the Act's validity under the Michigan Constitution. Goulding, Lino, *supra.*

case at hand." This conclusion is easily shown to be in error as ABC has demonstrated, *supra*, numerous facts at hand showing the vagueness non-union contractors encounter each time they encounter the PWA. Moreover, even if the Court of Appeals' substantive opinions had merit beyond mere *dicta*, the Court has applied the wrong standard in its review to ABC's "as applied" vagueness claim. The Midland County Circuit Court granted summary disposition of ABC's vagueness claim before any discovery has taken place. Since ABC has not yet been permitted to engage in discovery, the Court of Appeals was necessarily limited (assuming jurisdiction) to determining whether ABC has stated a valid claim before the trial court. In passing upon a motion for summary disposition for failure to state a claim, the Court of Appeals should have accepted as true all of ABC's factual allegations as well as any conclusions which could reasonably be drawn therefrom and determine whether the trial court erred in ruling that ABC's pleadings were so clearly deficient that no factual development could ever support the claim. Martin v. Michigan, 129 Mich App 100, 104-105 (1983) *lv den* 422 Mich 891 (1985). The Court of Appeals blew past this fundamental rule of judicial review and, instead, nixed ABC's vagueness claim for failure to provide adequate factual support. In doing so, the Court clearly erred with fatal prejudice to ABC. Thus, this honorable Supreme Court should grant ABC's Leave to Appeal and remand the case to trial for further factual development.

3. The Court of Appeals Committed an Error of Law When it First Decided it Lacked Subject Matter Jurisdiction Over this Case and Then Made Selective Substantive Determinations in *Dicta* Concerning ABC's Constitutional Challenge to the PWA as an Impermissible Delegation of Legislative Authority.

Just as it had done with ABC's vagueness claim, the Court of Appeals rendered substantive rulings concerning ABC's unlawful delegation claim. Again, according to established case precedent, EDS, Fox, Lehman and Bowie, *supra*, upon determining

(erroneously) that it lacked subject matter jurisdiction over this case, the Court of Appeals was duty bound to simply dismiss the case without discussion concerning the underlying merits. The Court's failure to do so with respect to ABC's unlawful delegation claim constitutes further legal error within its Opinion.

As is explained in detail below, ABC contends that the CIS is powerless under the PWA and the cases interpreting it to exercise discretion in setting prevailing wage rates, and that the CIS must apply what the unions and union contractors provide it by way of collective bargaining agreements and other understandings. Because these private parties can control the PWA rate-setting process, they negotiate one set of rates to be disclosed to the CIS for establishing prevailing wage rates and another secret set of open-ended lower rates (through ad hoc, subjectively applied "market recovery programs" a.k.a., "job targeting") for use in underbidding non-union contractors. Because these private parties have the legislative power to effectively better their own economic circumstances through manipulation of the PWA, the statute is constitutionally defective. In judicial review of this claim, the Court of Appeals examined a handful of the arguments made and cases cited by ABC and rendered its opinion on them. The Court was clearly wrong to do so after having dismissed the case for lack of jurisdiction, but it was also wrong because it erred in its analysis of ABC's arguments.

The Michigan Legislature is prohibited under Article 4, Section 1, from delegating its inherent legislative powers to private individuals, corporations or associations.[13] Detroit v. Detroit Police Officers Ass'n, 408 Mich 410 (1980); Penn School District v. Cass County Board of Education, 14 Mich App 109 (1968); In Re Hawkins, 244 Mich 681 (1928); Bird v. Arnott,

[13]The Constitution provides that "[t]he legislative power of the State of Michigan is vested in a senate and house of representatives." Const. 1963, Art 4, Sec. 1.

145 Mich 416 (1906). The power to set the standards of law vests solely in the Michigan Legislature. In Westerveld v. Natural Resources Commission, 402 Mich 412, 427-428, the Michigan Supreme Court described the prohibition on delegating such authority in this way:

> One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust. Cooley, Constitutional Limitations (6th Ed), p. 137.

Nevertheless, in order that the laws of the State might be administered, the Legislature's delegation of power to make subordinate rules within defined and prescribed standards has been allowed under the Michigan Constitution. Over time, the Michigan courts came to establish a "standards test" for determining the validity of legislative delegation of power. As was stated in Osius v. St. Clair Shores, 344 Mich 693, 698 (1956):

> There is no doubt that a legislative body may not delegate to another its lawmaking powers. It must promulgate, not abdicate. This is not to say, however, that a subordinate body or official may not be clothed with the authority to say when the law shall operate, or as to whom, or upon what occasion, provided, however, that the standards prescribed for guidance are as reasonably precise as the subject matter requires or permits.

In Osius, the Court examined whether a local zoning board's authority to "modify the application of [certain] regulations, 'in harmony with their general purpose and intent'" was an impermissible grant of legislative authority to the board. Finding that it was, the Court ruled:

> Upon the facts presented we are not concerned with the problem of variations in permissible standards between morally good and bad business, nor need we weigh the various factors that have influenced decision in the past upon the adequacy of the standard employed. *For in the case before us there is no reasonable standard whatever.* Id. at 698. (Emphasis added).

ABC contends that the PWA violates the prohibition on the transfer of legislative power from the Legislature to private third parties because the Act places the authority to fix prevailing wages and the classifications to which the wages apply squarely in the hands of unions and union contractors. Under the PWA, the CIS cannot exercise any discretion whatsoever over what may or may not constitute "prevailing wages," but must, instead, establish prevailing wages directly from union collective bargaining agreements. Resteel, *supra* at 413 ("the [CIS] has no discretion in establishing prevailing wage rates to depart from the wage provisions in local collective bargaining agreements ... ."). Since the CIS is a mere paper-shuffler in the process, the regulation of wages, benefits and assignment of work within classifications on state-funded construction projects in Michigan is passed to unions and union contractors to determine.

Although the Michigan Court of Appeals ruled in West Ottawa, *supra*, that the Legislature may use a fixed wage rate established by collective bargaining agreements as the standard for wages on prevailing wage projects, the Court also required that such a scheme is lawful only so long as it does not result in collusion between union and union contractors in furtherance of their own self-interests.[14] In this present case, ABC can show that collusion in the process does exist. The extent of the collusion is, of course, a matter for discovery which ABC has not yet been afforded. Since the regulations of the Act are derived from standard-less and ever-changing collective bargaining agreements and, further, since the unions and union contractors are able to use their position of power under the PWA to support their own self-

[14] Relying on New Jersey law, the Court ruled that, in its view, the Michigan Legislature had not delegated *any* policy-making authority, either to the CIS or to private third parties. Instead, according to the Court, the Legislature adopted a "policy" that the "union wage" was to be the measure applied on all state-funded projects. *Id.* at 245. While the Court acknowledged that the unions and union contractors could set new rates whenever they wanted, it concluded that no unlawful delegation existed under the Act because the third parties were setting standards under the "independent and unrelated" collective bargaining process, without any apparent concern for the operation of the PWA. *Id.* at 246.

interests, the Circuit Court ruled that ABC should have the opportunity to proceed to discovery in its attack on the constitutionality of the Act.

Without addressing the questionable legal basis upon which the Court in West Ottawa made its decision,[15] ABC contends that the case does not foreclose ABC's challenge that the Act represents an unlawful delegation of power under the facts of this present case. Importantly, in West Ottawa, the Court raised as "the critical inquiry:"

> ... whether the collective bargaining process is sufficiently independent of and unrelated to the prevailing wage statute to protect the public against collusive action which could result in an arbitrarily inflated wage rate for public contracts. *Id.*

Thus, according to the Court of Appeals, *where the collective bargaining process is no longer independent of and unrelated to the PWA but, instead, has become interrelated with the Act such that collusive action results between unions and union employers leading to arbitrarily inflated wage rates on public projects, unlawful delegation of legislative authority will be found.*

The foregoing principle from West Ottawa, *supra*, is sound and in keeping with both its underlying precedent and with precedent from the United States Supreme Court. First, the principle is consistent with the New Jersey case relied on almost exclusively by the Court of Appeals in West Ottawa. In Male, *supra* at 158, the Appellate Division of the New Jersey Superior Court regarded it as "highly improbable that [the unions and union contractors] would conspire together or collaborate to subvert the interest of the public in work performed on public

[15]The Court noted that there was a split of authority on the issue from other states. Thus, for a contrary view, see, e.g., Industrial Comm. v. C&D Pipeline, 125 Ariz 64; 607 P.2d 383 (1980); Bradley v. Casey, 415 Ill 576; 114 NE2d 681 (1953); Schryver v. Schirmer, 84 S.D. 352; 171 NW2d 634 (1969); Wagner v. City of Milwaukee, 177 Wis 410; 188 NW 487 (1922). Despite the fact that several of these rulings were from sister states (Illinois and Wisconsin), the Court nevertheless settled on a prevailing wage case from New Jersey, Male v. Ernest Renda Contracting Co., 122 N.J. Sup. 526; 301 A.2d 153, aff'd, 64 N.J. 99; 314 A.2d 361 (1974), as support for its ruling.

construction." On appeal, the New Jersey Supreme Court affirmed in a one-page opinion asserting that evidence demonstrating the "danger of arbitrary, self-motivated action by the private parties involved, detrimental to the public good, [had not] been shown." 64 N.J. at 201.

Second, the West Ottawa principle — where collusion exists, the statute will be found to be an unconstitutional delegation — is in accord with longstanding United States Supreme Court precedent. In Carter v. Carter Coal Co., 298 U.S. 238; 56 S.Ct 855; 80 L.Ed 1160 (1936), Congress had passed the Bituminous Coal Conservation Act of 1935 ("BCCA") which required every producer of bituminous coal within the United States to abide by certain labor standards contained in particular union collective bargaining agreements. Several plaintiffs brought suit challenging various provisions of the statute. Part III, Section (g) of the statute was challenged as an unconstitutional delegation of legislative authority to private parties. Agreeing with the plaintiffs, the Supreme Court ruled:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. ***This is legislative delegation in its most obnoxious form***; *for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.* The record shows that the conditions of competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also compete with the mechanical production of electrical energy and of natural gas. Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And *a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.* Schechter Corp. v. United States, 295 U.S. at p.

537; Eubank v. Richmond, 226 U.S. 137, 143; Seattle Trust Co. v. Roberge, 278 U.S. 116, 121-122. *Id.* at 311-312. (Emphasis added).

Clearly, the Supreme Court found that certain unions and union contractors could not directly and unilaterally set wage rates for all coal producers through operation of the BCCA.[16] Presumably, the Court of Appeals in West Ottawa determined that the situation it faced, where the unions and union contractors were apparently setting rates independent of the PWA's operation, was sufficiently distinguishable from the situation facing the United States Supreme Court in Carter Coal, where the parties were setting wage rates specifically to satisfy the terms of the BCCA. Of course, if the distinction is removed (as it is under the facts alleged in this present case), the two courts would be in accord and the PWA would have to be declared an unconstitutional delegation of legislative authority.

ABC contends that, since the time West Ottawa was decided, the collective bargaining process has lost whatever independence from operation of the PWA the West Ottawa Court determined had existed at that time. Unions and union contractors now reach understandings and negotiate classifications and wage rates with one eye fixed directly on the operation of the PWA. In doing so, they act in collusion, for their own self-interests, and at public expense – in clear violation of the holding of West Ottawa.[17] While full discovery is necessary to show the extent

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[16]Relying on Carter Coal, the Court in Industrial Comm., *supra* at 607 P.2d 385, held that the Arizona prevailing wage law constituted an unlawful delegation of legislative power to third parties because the law mandated sole reliance on union contracts without any discretion in the state labor agencies to reject or modify them in setting the wage rates under the statute. Similarly, in the case of Department of Industrial Relations v. Superior Court of Sacramento County, ___ Cal App ___ (Nov. 2, 2000), slip op. p. 21-22, the California Court of Appeals, relying on Carter Coal, *supra*, ruled that those portions of the state's prevailing wage law which required travel and subsistence pay to be paid at the amounts set directly from union collective bargaining agreements, without any review or consideration by any state agency, represented unconstitutional delegations of legislative power to third parties.

[17]One of the reasons the Court in West Ottawa mentioned as support for finding that the Act did not result in arbitrarily high wage rates on public projects through collusion of union and union employer, was that the "[CIS] is precluded, in determining prevailing wage, from consideration of collective

to which unions and union contractors have acted in collusion with one another in setting prevailing wages under the Act in a manner beneficial to them and with arbitrarily increased wage rates on public projects, certain examples are nevertheless readily apparent.

"Job targeting" practices of the unions and union contractors are a prime example. Typically, job targeting is initiated by an agreement for a "market recovery program" between the local union and the local association of union construction contractors. Under job targeting practices, union contractors maintain payment to their employees of the wage and fringe benefit rates called for in their collective bargaining agreements. From those wages, the unions receive a collectively bargained fixed return payment into the market recovery fund for each hour of work performed by union construction workers subject to the applicable collective bargaining agreement. A portion of those dues are then set aside to fund the market recovery program. In order to keep the union contractor in business, and consequently, to keep union dues flowing from the contractor's employees to the union at artificially inflated wage and benefit rates, the union provides a subsidy payment from the market recovery program funds to the contractor of a determined amount of wage cost recovery on particular jobs.

This type of agreement, calling for two different wage scales, is in use on construction projects in Midland County. For example, the collective bargaining agreement between the International Union of Operating Engineers, Local 324 ("Operating Engineers") and the Associated Underground Contractors ("Underground Contractors"), a multi-employer bargaining group, maintains a market recovery program identified at Section 7 of their agreement. (Exb. D,

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agreements or understandings which are 'controlled in any way by either an employee or employer organization.'" Id. at 267-247. See, M.C.L. 408.554. However, that provision of the Act is clearly not applicable to the facts of this case where ABC has raised *collusion* as a fact causing arbitrarily high wage rates on prevailing wage projects. ABC does not contend that any union or any union contractor has gained an upper hand in the collective bargaining process implicating the Act.

pp. 20-21). That agreement applies to underground contracting work in Midland County. (Exb. D, p. 3). An addendum to that agreement *undisclosed to the CIS* provides for a wage and fringe benefit rate of several dollars less per hour to be applied where a contractor/member of the Underground Contractors is bidding a project against non-union competition. (Exb. J). If compelled, at least one underground contractor who is a party to the agreement with the Operating Engineers will testify that he and the union have agreed to use the lower rates found in the addendum every time the contractor attempts to secure non-prevailing wage work, including such work in Midland County. Testimony will also show that since the vast majority of underground construction work performed in Midland County is private construction to which the PWA does not apply, virtually every non-prevailing wage project bid by this contractor in Midland county is bid and performed under the reduced rates in the addendum to the contract. Yet, all construction work on state funded projects subject to the PWA must be paid at the higher wage and fringe benefits rates found in the collective bargaining agreement (Exb. D) disclosed to the CIS, in lieu of the much lower rates typically paid pursuant to the undisclosed addendum agreement. (Exb. J).[18]

[18] In addition, construction trade unions can focus their job targeting practices directly to prevailing wage projects. On a prevailing wage project, all contractors bidding on the project must do so using wage and fringe benefit rates equal to or exceeding the rates found in the applicable collective bargaining agreement. The trade unions have apparently agreed to kick back money, received through collectively negotiated market recovery plans, to union contractors bidding on such projects so as to assist the contractor in lowering his bid below that of all non-union contractors bidding on the job. This scheme virtually guarantees selection of the union contractor by the contracting agent of the project because the only way a non-union contractor can compete against job targeting on prevailing wage jobs is to lower his price so much that he realized very little profit, no profit, or perhaps even a loss. Of course, the union contractor still realized his full profit because the cost of lowering his bid is reimbursed by the union's promise of subsidy from the market recovery program funds. Furthermore, because the union contractor awarded the job will pay his workers at the high rates identified in the collective bargaining agreement, the union receives a substantial return on its subsidy payment to the contractor through maximum dues collection. This collusive scheme results in the union and union contractors creating an unlevel playing field on prevailing wage work in Michigan through application of the PWA in contravention to the principles enunciated in West Ottawa.

The PWA requires the CIS to rely on collective bargaining agreements and all other "understandings" between unions and union contractors in the locality in setting the classifications and wage rates in the appropriate wage report. M.C.L. 408.554. Yet, since the CIS is powerless to do anything other than to blindly transfer the classification and wage rate information it receives from these private parties onto the wage report, the wage reports consequently contain no more and no less than exactly what the unions and union contractors prefer them to contain. Discovery will show that unions and union contractors never submit any of the lower wage rate information stemming from their market recovery programs. What explanation *other than collusion* can explain this failure to provide such critical wage and benefit rate information to the CIS? If it is collusion as ABC contends, then the concerns recognized, but not factually presented in West Ottawa, will exist in this present case, thus supporting a finding of unlawful delegation of legislative authority.

It is on this point that the Court of Appeals rendered an erroneous conclusion in *dicta*. At page 11 of its Opinion (Exb. A), the Court of Appeals "rejected" ABC's argument that Resteel, *supra*, restricts the CIS from exercising discretion in establishing prevailing wage rates in any manner other than what and how the information is provided by unions and union contractors. As support for its rejection, the Court restated major portions of the Resteel case itself (Exb. A, pp. 11-13), and then concluded that Resteel does not prevent the CIS from considering several wage rates from collective bargaining agreements nor does it prevent the CIS from asking for full disclosure from unions and union contractors. The Court's conclusion is not only wrong, but it is of no consequence to the proper resolution of ABC's case. First, the Court's understanding of Resteel contradicts the holding of the case. In Resteel, at 408, the Court stated that "Before 1994, the [CIS] established all prevailing wage and fringe benefit rates according to the rates in

collective bargaining agreements *as reported* in a survey circulated by the CIS." (Emphasis added). When the CIS attempted to establish a uniform application of overtime rates from these surveys, the Court put an immediate halt to the process ruling "under the unambiguous language of the PWA, the [CIS], in establishing prevailing wage rates, has ***no discretion*** *to depart from the wage provisions in local collective bargaining agreements ... .*" Id. at 413. (Emphasis added). Thus, from the express language of Resteel, it is clear that ABC is correct in its assessment that the CIS must take exactly what the unions and union contractors disclose, no more and no less, when establishing prevailing wage rates. Second, ABC does not contend that the CIS is unable to include market recovery rates in establishing prevailing wage rates if *they were ever disclosed by the unions and union contractors.* Therefore, the Court's conclusion that Resteel doesn't prevent the CIS from applying several wage rates of a collective bargaining agreement is simply irrelevant.[19] Clearly, the Court of Appeals erred when it rejected ABC's argument concerning the import of Resteel to ABC's unlawful delegation claim.

The precise forms and uses of job targeting programs in Michigan and in Midland County would certainly be revealed through discovery on remand. Nevertheless, ABC has obtained documents showing that the International Brotherhood of Electrical Workers (IBEW), Local 692, and the National Electrical Contractors Association (NECA) are parties to a collective bargaining agreement which includes a job targeting program resulting in a two-tier wage system. The IBEW and the NECA have negotiated a collective bargaining agreement with a particular wage and fringe benefit scale. That scale is automatically adopted by the CIS in its Midland wage report (Exb. E). However, an amendment to the agreement, again, *undisclosed to the CIS,*

[19] Of course, how the CIS would express the application of job targeting rates to prevailing wage projects is anyone's guess given the fact that job targeting is, by its very nature, an ad hoc application of special undetermined rates for particular projects targeted by the unions.

provides for a reduced rate to be paid to electrical employees under the IBEW's "Electrical Industry Advancement Fund" ("E.I.A.F."). (Exb. K). Significantly, the rules referenced in the amendment indicate that the reduced rates paid under the E.I.A.F. are not to be applied to prevailing wage projects. (Exb. K; "Policy #13"). The result is a two-tier wage system – a competitively set wage rate for non-prevailing wage projects and an artificially higher collusively established wage rate for prevailing wage projects. This is precisely the kind of collusive system the West Ottawa Court warned would render the PWA unenforceable as an impermissible delegation of legislative authority to third parties.

The IBEW collective bargaining agreement also contains an "addendum" to the contract which creates yet another form of two-tier wage system. (Exb. L). Upon request, a union contractor may pay a "low-scale" journeyman rate of either 5% or 10% less than that described in the collective bargaining agreement. (Exb. L, parag. 8). However, because these reduced rates are not available on "state and federal prevailing wage job," (Exb. L, parag 1), a second two-tier wage system is created in violation of the principles enunciated in West Ottawa.[20]

No matter which form of job targeting is used, and no matter whether job targeting is focused toward public or private projects, job targeting represents a scheme between unions and union contractors resulting in artificially high wage and fringe benefit rates that are not reflective of true, market rates in the construction industry. Union contractors agree to exorbitant wage

[20]Not only have the IBEW and the NECA created *two* two-tier wage systems through amendments and addendums to their collective bargaining agreement, but these parties have also created a "Temporary Worker Program" which, likewise, creates an additional collusive two-tier wage system resulting in artificially high wage rates on prevailing wage projects. These parties have negotiated a "Letter of Understanding" whereby a union contractor may use lower-paid "temporary workers" on non-prevailing wage projects. (Exb. M, parags. 5, 8). Since the Letter of Understanding specifically provides that these low paid workers are *not* permitted to work on prevailing wage projects, a third form of two-tier wage systems is established by the IBEW and the NECA, resulting in inflated wage rates on public projects, contrary to the warnings of the West Ottawa Court.

and fringe benefit rates in their collective bargaining agreements because they know that the union will assist them with a kicked-back subsidy allowing the contractors to compete in the marketplace. These exorbitant rates are automatically used to set the "prevailing wage" on public construction projects. Thus, job targeting is, in essence, intentional collusion on the part of unions and union employers to gain competitive advantage in the marketplace, resulting in artificially increased costs to the public for public construction projects. Under West Ottawa, collusion resulting in artificially high wage rates on prevailing wage projects is not permitted and must result in a finding that the PWA constitutes an unconstitutional delegation of legislative power to third parties. West Ottawa, *supra* at 246.

It appears that only a handful of states have prevailing wage statutes which, like the Michigan PWA, automatically accept the rates of collective bargaining agreements as the "prevailing rates" on publicly-funded construction projects without any meaningful review or oversight by a government agency.[21] Significantly, one of those states had a federal court determine that a part of its prevailing wage law may be unconstitutional if unions and union contractors setting the prevailing wage standards had maintained wage systems varying between prevailing wage projects and non-prevailing wage projects, resulting in artificially high prevailing wage rates. In General Electric Co. v. New York State Department of Labor, 936

[21]Currently, Michigan, Ohio and New Jersey each adopt the wage and fringe benefit rates found in applicable collective bargaining agreements as the "prevailing rates" on publicly funded construction projects. Again, the New Jersey courts found its law to be valid, but only because the plaintiff could not show collaboration between the unions and union contractors harming the public interest. Male, *supra.* Arizona had a similar statute, but it was found to be unconstitutional as an unlawful delegation of legislative power to third parties under Carter Coal, *supra.* Industrial Comm., *supra.* A South Dakota prevailing wage law and a particular portion of the Illinois prevailing wage law, both of which automatically adopted collective bargaining agreement rates, were also found to be unconstitutional under theories similar to that expressed in Carter Coal. Schryver, *supra*; Bradley, *supra.* Finally, Wisconsin also had a similar statute in 1922 found to be unconstitutional on a similar theory to that expressed in the subsequently decided Carter Coal decision. Wagner, *supra.* (Wisconsin has since enacted a new statute).

F.2d 1448 (1991), the State of New York maintained a prevailing wage law similar to the Michigan PWA that required workers on state-funded projects to be paid the rates fixed by virtue of the collective bargaining agreements in the locality of the work. *Id.* at 1450. A non-union contractor challenged whether the statute constituted an unlawful delegation of legislative authority to third parties given the fact that the agreements of the third parties called for two different rates of pay – one for prevailing wage work and another for private work. *Id.* at 1451-1457. The trial court rejected this contention but the Second Circuit Court of Appeals agreed with the challenge, ruling at 1457-1458:

> Taken together, these portions of the Local 3 and Local 25 agreements call into question the district court's conclusion that the adversary nature of the collective bargaining process has, as a practical matter, served to curb the arbitrary self-interest of the parties who negotiated them. What seems to have occurred is that the unions and the local electrical contractors association negotiated their agreements fully aware of the impact their contracts would have on the prevailing wage applied to public works projects in the locality, and that those wage rates were then manipulated to the mutual advantage of both the unions and the employers.
>
> Taking the facts alleged by appellant as true, the two "adversary" parties set a relatively low rate for electrical work done in the private sector in order (from the union's perspective) to make employment of union workers more attractive to employers, and (from the employers' perspective) to achieve lower labor costs for private sector employers. A higher wage rate for public work projects was agreed to in order (from the union's perspective) to make up some of the wages lost on the private sector work, and (from the employers' perspective) to give the unions higher wages without the employers incurring greater labor costs since the higher wages would be passed on to the taxpayers.
>
> If this is in fact what occurred -- and we express no view as to whether it did or did not -- then neither side was forced to curb its self-interest, and the rates set in the agreement are potentially arbitrary because they reflect not the wage rates of an adversarial marketplace, but the wage rates in a setting skewed by the bargaining parties' knowing use of their agreement to achieve selfish ends. It would be difficult to measure how distorted the resulting rates are because the rates depend on subjective factors such as the amount of public versus private sector work each party, at the time they were negotiating, thought would be contracted for during the term of the agreement; but this perversion could be

> endemic to the system as GE asserts. In fact, the false light could be such that for the state to use only these privately-negotiated agreements would make it literally impossible for it fairly to set prevailing wage and supplement rates. It is this potential -- that a system which relies solely on such privately-negotiated agreements will consistently fail to produce non-arbitrary wage and supplement rates -- that makes GE's facial attack on the statute viable.
>
> We think whether the provisions of these two collective bargaining agreements were collusively negotiated, and whether collusive negotiation, if it actually exists, is unavoidable given the statute's exclusive reliance on privately negotiated collective bargaining agreements, present questions of fact that preclude summary judgment. On remand, GE should be entitled to thorough discovery on these issues and it should be permitted to attempt a showing that Labor Law 220 is unconstitutional on its face because it delegates legislative power to private parties without sufficient standards to guide them.

Similar to New York's Labor Law 220, the Michigan PWA allows the unions and union contractors to set the prevailing wage in a locality through application of their collective bargaining agreement. The Act provides no standards to the CIS (or to the third parties), but instead fixes the prevailing wage rates at whatever is found in the collective bargaining agreements. West Ottawa, *supra*, Resteel, *supra*. Because the unions and union contractors have come to the conclusion that they have the unrestricted power to unilaterally set the rates on public projects through their agreements to which all contractors must abide, they have set those rates artificially high with the knowledge that union contractors will still be able to compete in the marketplace against non-union contractors through collusive job targeting subsidies. While ABC can only show the "tip of the iceberg" at this time, if permitted to engage in discovery on remand (as the plaintiff in General Electric was allowed to do), ABC could show that such factual collusion exists, that it harms the public interest through inflated prevailing wage rates, and that it must lead to a legal conclusion that the PWA unconstitutionally delegates legislative power to third parties. West Ottawa; General Electric, *supra*.

In discussing the trial court's reliance upon General Electric, *supra*, for denying summary disposition of ABC's unconstitutional delegation claim, the Court of Appeals erroneously concluded at footnote 7 of its Opinion that there is a meaningful difference between the PWA and the statute in General Electric, which rendered ABC's unconstitutional delegation claim a nullity. The Court of Appeals dismissively disposed of the General Electric case by indicating that the Michigan PWA contains a provision which allows for discarding union agreements which are "controlled in any way by either an employee or employer organization," while the New York statute does not contain such safeguards. However, a simple reading of General Electric makes clear that the New York statute does allow the administrative arm of the state government to exercise discretion to disregard artificially inflated rates, thereby rendering the Court of Appeals conclusion legally erroneous. At page 1457, the Court ruled:

> [the State of New York contends] it is free to reject those rates artificially increased or decreased due to language in the collective bargaining agreement that bars the application of the more favorable low rate to public works projects. We agree with the state. Fairly read, the statute does allow it this discretion.

Thus, the Court of Appeals in this present case clearly erred in its attempt to distinguish the General Electric case on this basis.

Although the language of the New York statute and Michigan's PWA is not identical, they both allow unions and union contractors to set prevailing wages through application of their collective bargaining agreements. Neither statute provides standards with regard to calculating the prevailing wage rate, but instead fixes the prevailing wage rates at whatever is found in the collective bargaining agreements. Thus, as unions and union contractors in New York and Michigan have come to the conclusion that they have the unfettered power to unilaterally set wage rates on public projects, they have set those rates artificially high with the knowledge that

union contractors will still be able to compete in the marketplace on non-prevailing wage jobs against non-union contractors through collusive job targeting subsidies. Thus, the attempt of Court of Appeals to distinguish these statutes based upon the statutory language disregards the offending collusive practices inherent in both statutes. See General Electric at 1457.

Furthermore, whether some discretion exists for the CIS to disregard rates based on fraud or uneven bargaining power between unions and union contractors doesn't really matter. According to Resteel, *supra*, the CIS must fix prevailing wage rates precisely as the collective bargaining agreements identify them. Thus, even if the unions and union contractors were to come out from the shadows and make known to the CIS the establishment of different rates between private jobs and publicly funded jobs, the CIS still must accept those rates precisely as described in the collective bargaining agreements. Therefore, it is the PWA's statutory scheme itself which offends our constitutional requirement that the Legislature not abdicate its authority to private third parties. As the Second Circuit expressed in General Electric, at 1457-1458:

> ... the rates set in the agreement are potentially arbitrary because they reflect not the wage rates of an adversarial marketplace, but the wage rates in a setting skewed by the bargaining parties' knowing use of their agreement to achieve selfish ends. *** ... [T]his perversion could be endemic to the system as GE asserts. *** It is this potential – that a system which relies solely on such privately-negotiated agreements will consistently fail to produce non-arbitrary wage and supplement rates – that makes GE's facial attack on the statute viable.

The Court in West Ottawa held that the crucial inquiry is whether the collective bargaining process is sufficiently independent of and unrelated to the prevailing wage statute to protect the public against collusive action which could result in an arbitrarily inflated wage rate for public contracts. *Id.* at 246-247. Since job targeting practices either did not exist at the time West Ottawa was decided or simply were not presented to the Court, the West Ottawa Court held the PWA was not an unlawful delegation to third parties. The facts and circumstances

underlying the present case show that collusion does, in fact, exist and that it drives up wages arbitrarily on prevailing wage projects. While the collective bargaining process may have been "independent and unrelated" to the PWA at the time West Ottawa was decided, ABC can show that the unions and union contractors bargain and create understandings with the application of the PWA firmly in view. While more discovery is certainly needed (a fact recognized by the Circuit Court in its denial of the various defendants' motions for summary disposition of this claim), this honorable Supreme Court should find at this time that ABC has demonstrated sufficient facts to support a valid claim that the PWA constitutes an unconstitutional delegation of legislative authority to private parties and reverse the Court of Appeals to the extent that it found in *dicta* to the contrary. West Ottawa, General Electric, *supra*.[22]

RELIEF REQUESTED

WHEREFORE, the Plaintiff/Appellant, ABC respectfully requests that this honorable Michigan Supreme Court review this matter and, finding the conclusions of law of the Court of Appeals legally erroneous, grant ABC's Application for Leave to Appeal.

Dated this 20th day of October, 2003.

MASUD, PATTERSON & SCHUTTER, P.C.
Attorneys for Plaintiff/Appellant

By: _____
DAVID JOHN MASUD (P37219)
KRAIG M. SCHUTTER (P45339)
4449 Fashion Square Boulevard
Saginaw, Michigan 48603
(989) 792-4499

[22]In particular, the Second Circuit Court of Appeals in General Electric strongly suggested that a prevailing wage law's exclusive reliance on union contracts may, in and of itself, preclude summary disposition. There, the court stated: "... whether collusive negotiation, if it actually exists, is unavoidable given the statute's exclusive reliance on privately negotiated collective bargaining agreements, *presents questions of fact that preclude summary judgment*." Id. at 1458. (Emphasis added).